

# ADR for our Aging Population – Elder Mediation: Prepare for the New Demographic

By: Rachel Frydman & Mary Korica

The ADR Institute of Ontario (“ADRIO”) presented a conference on elder mediation on Thursday, April 3, 2014 in Toronto. This day was co-hosted by Resa Eisen and Barbara Benoiel. The all-day event provided comprehensive coverage of relevant issues, skills and practice, and conveyed a field that is buzzing with new developments and potential.



Barbara Benoiel, Ph.D. is a mediator, facilitator and trainer specializing in ADR. She holds degrees in Psychology, Organizational Behaviour, and Criminal Justice. She is the President of Preferred Solutions, a dispute resolution company. Her practice area is in Human Rights training, civil and criminal mediation, restorative justice, group facilitation, governance, and system design with family owned businesses, partnerships, large companies, institutions and not-for-profits, governments and unions.



Resa S. Eisen has been in the field of mediation, providing services and developing programs for clients in the public and private sectors, for more than 35 years. Her mediation practice has focussed on family law, workplace issues, and now elder and family conflicts. Resa designed the Elder Mediation Training Program (EMTP), the first of its kind in Canada, and provides Elder Mediation workshops across the country.

Barbara Benoiel, a mediator and dispute resolution specialist, opened the conference by providing a warning to the room full of ADR professionals: the Canadian population is getting older, and with this change in demographic comes a plethora of opportunity for dispute surrounding the physical, psychological, emotional, and fiscal needs of the aging population. Many of these disputes involve family dynamics, which is where mediation can offer its benefits of the preservation of relationships. For an aging individual, relationships are vital for managing good health and well being. Barbara cautions that we, as professionals, are not equipped with relevant information, nor have we received adequate training to serve this emerging client base. Thus, the conference served to begin to fill in the missing gaps, both substantively with best practices, and insightfully with desire to prepare for the emerging field of elder mediation.

Arlene Groh, an elder abuse/restorative justice consultant, thoroughly depicted the concept of elder abuse, its roots and the dynamic in which it exists. She defined elder abuse as “the mistreatment of an elderly person by someone that they should be able to rely on: a spouse, a child, another family member, a friend, or a paid caregiver.” Arlene spoke to the complexity of this mistreatment in that it appears in many overlapping forms: emo-

tional, physical, financial, sexual, neglect, and violation of rights. Many of the scenarios that Arlene provided to explain these forms of abuse are common occurrences that are witnessed everyday. For example, failing to knock on the door of an elderly person’s room before entering is indeed a violation of his/her right to privacy. Further, causing an elderly person to feel isolated while in your care is a form of emotional abuse.

It is important to identify the root causes of elder abuse in order to prevent an abusive situation from escalating. Alcohol, substance abuse, and mental disorders are a few of the more obvious signs to spot, however the diagnosable causes are not always present. Ageism and the need for power and control are a few causes that can be hidden by a seemingly normal relationship between an elderly person and a relative, caregiver, or friend. It is important to limit our own assumptions about these relationships and be open to the ideas that the abuser can be anyone, and that the elderly person may not identify the mistreatment as such. ADR professionals are familiar with the need to screen for power imbalances between parties in mediation. There is always a power imbalance that exists in situations of elder mediation, therefore it is the mediator’s job to appropriately mitigate this specific imbalance.

Laurie S. Redden, Deputy Public Guardian and Trustee, and

Heather Mountford, of Goddard, Gamage, Stevens LLP, both experienced in incapacity issues, shared their knowledge on the legal issues that arise when an elderly person may not be capable of making decisions in his/her life. Heather discussed two of the types of decisions that are affected by mental capacity are decisions relating to property and personal care. An attorney under a Power of Attorney or a guardian makes these decisions in the event that a person (e.g. elderly person) does not demonstrate the capacity to manage their property or health. The *Substitute Decisions Act* defines incapacity as not being able to understand information relevant to the decision, and appreciate the reasonably foreseeable consequences of a decision or lack of decision. It is important to know who can assess for capacity, as it is a formalized process by a capacity assessor who is trained and designated an assessor by the Minister of Attorney General and subject to the legal tests set out in the *Substitute Decisions Act*. For health care decisions, 'evaluators' under the Health Care Consent Act may assess capacity to make decisions relating to medical care, long-term care or personal assistance services. Capacity is important for mediators to understand, as the mediator must ensure that each party is capable of making decisions required during mediation. For the elderly, this issue often surfaces in family and estate mediations.

Mediators should not be requesting capacity assessments; rather this is the responsibility of the lawyer or the supportive family member responsible for the elderly person. Laurie advised that the person who requests a capacity assessment is responsible for paying the capacity assessor, although this may be refunded later if the assessed person is

found to be incapable.

Laurie provided the audience with helpful tips for mediators who are presented with an elderly party and capacity may be, or become, a concern. She advised that the mediation process may need to be altered to accommodate an elderly person. Logistically, two or more shorter sessions are more suited to the participation abilities of an elderly person than is one long mediation session.

It is also worth being mindful of the fact that capacity of an elderly person can fluctuate over time, and sessions may need to be rescheduled because of this. The mediator should be responsive to signs of tiredness, confusion, or lack of understanding by the elderly. This may mean taking breaks, rephrasing points, or summarizing. Intuitively, mediators make use of these strategies as part of the mediation process, however the aging demographic will cause professionals to maximize their adaptability, flexibility, and ability to gauge party dynamics.

Constable Patricia Fleischmann, Vulnerable Persons Coordinator with the Toronto Police Service discussed the issue of elder abuse

from a criminal perspective. Her talk was timely, as she had just participated in a police news conference about the arrest of two suspects charged in connection with the financial abuse of an elderly Toronto woman. This elderly woman had been abused

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by her housekeeper, someone whom had become rather important to her over time, by providing more and more care and assistance. What is not always realized is that the forms of abuse discussed by Arlene are actually, often, criminal code offences. As a result of these misinterpretations, victims generally fail to report these crimes and bystanders may not intervene. Professionals working with the older person frequently don't assist either, usually citing privacy issues. For the victim, common responses to abuse are denial, minimizing, and rationalizing, and this especially occurs when the abuser is a family member. Victims do not

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want to lose the companionship and relationship that their abuser often provides for them, despite the abusive behaviour. Notwithstanding the lack of reporting, there has been enough criminal activity in this area that financial abuse of older adults has actually been coined the "crime of the century."

How can the Toronto Police Service be of assistance in elder abuse situations, beyond charging a victim criminally? The TPS is also committed to educating and empowering victims, bystanders, and professionals who may come across elder abuse, about how to identify the abuse and subsequent steps that should or can be taken. They also provide access to a network of social services and community agencies that provide support for victims. Above all, Constable Fleischmann stressed how important it is to talk to the victim when investigating, whether or not abuse is present. Although seemingly an obvious point, many of the speakers touched on this throughout the conference. People have the notion that because someone is old, their interests should not be regarded as highly as the younger person who is present in the situation. This belief is tantamount to ageism. Elder abuse is evidently a critical issue in society, today,

however Constable Fleischmann is confident that every community, including the ADR community, can take positive measures to ensure that victims are protected.

Amy D'Aprix, a gerontologist working with the Bank of Montreal to coach clients on a holistic approach to retirement planning, delivered a lunchtime talk on "essential conversations" aging adults need to have with their families about what she calls the most important issues. End-of-life care, powers-of-attorney and wills, perspectives on quality of life and values, and other late life transition issues are difficult to broach, making doing so early and often all the more necessary. Many people do not realize this, or do but are not able to do it effectively, or their adult children are not willing to address these topics. Far too often the result is painful conflict that could have been avoided, and that can reverberate through generations. Amy exhorted ADR professionals to facilitate effective family communication on these matters, with particular attention to people's deep need to feel heard and understood—something often least experienced within the family context.

Colm Brannigan, an online media expert, started off the afternoon by noting that the rates of growth in social media usage are astonishing, including for the over-55 demographic, marking a permanent cultural shift and making social media presence highly worthwhile for the elder mediation professional. Moreover, mediation and social media have a key characteristic in common—both rely on interactive communication, namely storytelling, conversations and audience engagement. Social media marketing is about sharing information that promotes further information sharing. A considered mix of website, blogs, and presence on platforms like LinkedIn,

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Twitter and Facebook creates connections with potential clients while communicating the services you offer and contributing to your reputation as a professional or expert. This kind of outreach should be undertaken with an informed strategy to maximize the benefits (fostering relationships with those who see value in you) and avoid the pitfalls (permanent records or sanctions for disallowed search engine optimization) of online activity.

Resa Eisen, an elder mediation expert, and Barbara Benoliel encouraged practitioners of elder mediation to develop a personal approach that consciously draws from the variety of theoretical approaches to mediation that have proven successful. They

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provided an overview of the basics of interest-based, insight, facilitative, transformative, narrative, adult guardianship, therapeutic, restorative and mediation efficacy mediation models. Resa and Barbara also recommended practitioners access the speakers, associations and conferences available, and network with specialists in the field. They noted the opportunities for specialization and that other fields, such as health care, the legal profession, and financial practitioners and banks are engaged on issues important for elder mediation. Resa and Barbara concluded by mentioning that mediation, despite its core value of bringing all relevant parties to engage on an issue, is a field that still has room to overcome silos between its own areas of expertise, in elder mediation and otherwise.

Resa provided the last presentation of the day, and spoke about skills and issues involved in elder mediation. She noted that every decision regarding the life transitions of older people involves many individuals, and has great potential to resurrect old hurts. These transitional moments also involve some degree of loss, not only for the individual at the heart of the transition, but also for others (for example, caregivers likewise experience loss of independence). Power shifts and imbalances, and the impacts of family history, are always in play. Resa advocated for an approach that spends the majority of time on premediation, which is opposite to traditional practice. It is also important to include even peripheral parties, and treat premediation as a truly exploratory, rather than goal-oriented, stage. Resa concluded the day by emphasizing how important trust-building is within the elder mediation process, and the therapeutic function that mediation often serves alongside its primary purpose. ♣

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